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Nos. 84-544 & 84-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASSOCIATION OF CALIFORNIA WATER AGENCIES, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

and

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

COUNTY OF DEL NORTE, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

and

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS J. GRAFF
ENVIRONMENTAL DEFENSE FUND
2606 Dwight Way
Berkeley, California 94704
Telephone: 415/548-8906

Of Counsel

BRIAN E. GRAY*
HOWARD, RICE, NEMEROVSKI,
CANADY, ROBERTSON & FALK
A Professional Corporation
Three Embarcadero Center,
7th Floor
San Francisco, California 94111
Telephone: 415/434-1600
Attorneys for Respondents
* *Counsel of Record*

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LIST OF CORPORATE PARTIES' PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

In accordance with Supreme Court Rule No. 28.1, the parent companies, subsidiaries, and affiliates of each Respondent that is a corporation are as follows:

The Sierra Club is affiliated with the Sierra Club Legal Defense Fund and the Sierra Club Foundation, which are California non-profit corporations, and with the Sierra Club of Ontario, the Sierra Club of Ontario Foundation, and the Sierra Club of Western Canada, which are Canadian non-profit corporations. The Sierra Club has no parent companies or subsidiaries.

The Environmental Defense Fund and California Trout, Inc. have no parent companies, subsidiaries, or affiliates.

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the Secretary of the Interior did not violate regulations promulgated by the Counsel on Environmental Quality ("CEQ") where (a) the Secretary waited longer than the thirty days required by the regulations before designating portions of five northern California rivers as components of the National Wild and Scenic Rivers System, (b) the regulations themselves provide that "trivial" departures from the requirements of the regulations shall not invalidate agency action, (c) there was no finding of bad faith, and (d) neither Plaintiffs nor any other person or public agency suffered injury.

2. Whether the Court of Appeals erred in concluding that the Secretary did not act arbitrarily or capriciously where full review of the administrative record "belies" Plaintiffs' contention that the Secretary failed to consider a factor relevant to his decision to designate the rivers.

3. Whether the Court of Appeals erred in deciding that the Secretary did not abuse his discretion in including the rivers in the National System.

4. Whether the Court of Appeals erred in concluding that no triable issues of fact exist to support Plaintiffs' claim that the final Environmental Impact Statement with respect to the proposed designation was inadequate.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents—the Environmental Defense Fund, the Sierra Club, California Trout, Inc., and Save the American River Association—respectfully request the Court to deny the petitions for writs of certiorari, which seek review of the

decision of the United States Court of Appeals for the Ninth Circuit in these cases. The opinion of the Court of Appeals is reported at 732 F.2d 1462 (9th Cir. 1984). The opinion of the Court of Appeals denying the petitions for rehearing is unreported, but is reproduced as Appendix B to the petition for writ of certiorari filed by the Association of California Water Agencies, *et al.*[1]

STATEMENT OF THE CASE

I.

THE NATIONAL WILD AND SCENIC RIVERS ACT

In enacting the National Wild and Scenic Rivers Act of 1968, Congress declared it to be

> "[t]he policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations." 16 U.S.C. § 1271.

The purpose of the Act was to complement "the established national policy of dam and other construction at appropriate sections of the rivers of the United States" with "a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes." *Id.*[2]

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[1] Petitioners Association of California Water Agencies, *et al.* are referred to herein as "ACWA Plaintiffs"; Petitioners County of Del Norte, *et al.* are referred to as "Del Norte Plaintiffs." The material contained in the appendix to the petition for writ of certiorari filed by the ACWA Plaintiffs is cited as "ACWA App."; citations to the appendix to the petition for writ of certiorari filed by the Del Norte Plaintiffs are designated "Del Norte App." References to the appendix attached to this brief in opposition are cited as "EDF App."

[2] Thus, the Act prohibits the Federal Energy Regulatory Commission from licensing the construction of any hydroelectric facility on a component river (16 U.S.C. § 1278(c)), withdraws from appropriation all minerals in the federal lands located within one-quarter mile of a component river (*id.* § 1280(a)(iii)), and requires all federal agencies with jurisdiction over lands adjacent to a component river to manage those lands so as "to protect such rivers in accordance with the purposes of [the Act]." *Id.* § 1283(a).

Congress originally designated ten rivers as components of the National Wild and Scenic Rivers System (*id.* § 1274(a)(1)-(10)) and reserved the authority to add other rivers to the system in the future. *Id.* § 1273(a)(i). It also provided that the Secretary of the Interior could include in the National System rivers designated as wild and scenic under state law. *Id.* § 1273(a)(ii). Congress gave the Secretary this authority in order to ensure that state-designated rivers would not be adversely affected by the activities of federal agencies "without the full knowledge and consent of Congress." H.R. Rep. No. 90-1623, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 3801, 3803; *see* note 2, *supra*. Thus, Section 2(a)(ii) of the Act provides that the Secretary may place rivers in the National System if four conditions are met:

1. The Governor of the State through which the rivers flow requests the Secretary to designate the rivers as components of the National System.

2. The rivers have been "designated as wild, scenic or recreational rivers by or pursuant to an act of the Legislature of the State . . . through which they flow."

3. The Secretary determines that the rivers "are to be permanently administered as wild, scenic or recreational rivers by an agency or political subdivision of the State . . . without expense to the United States."

4. The Secretary finds that the rivers "meet the criteria established in [the Act] and such other criteria supplementary thereto as he may prescribe." 16 U.S.C. § 1273(a)(ii).

The petitions for writs of certiorari question the manner in which the Secretary applied these criteria to the facts of these cases.

II.

GOVERNOR BROWN'S APPLICATION AND SECRETARY ANDRUS' DESIGNATION

On July 18, 1980, California Governor Edmund G. Brown, Jr. asked Secretary of the Interior Cecil D. Andrus to include portions of five Northern California rivers—the Smith, Klamath, Eel, Trinity, and Lower American—in the National Rivers System. EDF App. A. In accordance with Section 2(a)(ii) of the National Wild and Scenic Rivers Act, all of the rivers included in the application are components of the California Wild and Scenic Rivers System, having been designated as such by the California Legislature in 1972. Cal. Pub. Res. Code §§ 5093.54 & 5093.545 (West Supp. 1984).

The Heritage Conservation and Recreation Service of the Department of the Interior ("HCRS") began its evaluation of California's application on July 21, 1980. ACWA App. S. HCRS determined that the proposed designation required an Environmental Impact Statement ("EIS"). Although not required by regulation, HCRS held eight public meetings on the scope of the EIS. 45 Fed. Reg. 52,459 (1980). After reviewing comments submitted by the public and federal agencies, HCRS, with the assistance of various California officials, prepared a draft EIS, which it filed with the Environmental Protection Agency ("EPA") on September 16, 1980. *County of Del Norte* v. *United States,* 732 F.2d 1462, 1465 (9th Cir. 1984).

As part of the public review process on the draft EIS, HCRS conducted ten public meetings in five cities. 45 Fed. Reg. 66,213 (1980). The meetings were widely attended, and a full range of views and criticisms was received and documented. In accordance with Interior Department regulations, HCRS extended the comment period to November 20, 1980, providing a total of sixty-two days for public comment on the draft EIS—seventeen days longer than required by the applicable CEQ regulation, 40 C.F.R. § 1506.10(c). 45 Fed. Reg. 70,325 (1980).

Nevertheless, some of the Del Norte Plaintiffs filed suit, seeking to extend the public comment period even longer. On November 14, 1980, the District Court issued a temporary restraining order, which forbade HCRS to close the comment period on the draft EIS. *Del Norte,* 732 F.2d at 1465. Concluding that it lacked jurisdiction, however, the District Court subsequently dissolved the order on December 1, 1980. *Id.* The comment period, extended eleven days by the TRO, officially closed on that date. HCRS nonetheless accepted and considered additional comments through December 5, which provided a total of seventy-six days for public comment on the draft EIS—thirty-one days more than required by the CEQ regulations. *Id.*

In light of the comments received during the review period, HCRS drafted a final EIS, which it filed with EPA on Friday, December 12, 1980. HCRS also made available to the public that day copies of the final EIS at its offices in San Francisco and Washington, D.C. *Id.* Over the weekend, HCRS began mailing copies of the final EIS to 700 "priority" recipients and completed its distribution on Monday, December 15, 1980. *Id.* Plaintiffs received their copies of the final EIS on Wednesday, December 17. *Id.* On that same date, HCRS published a "notice of availability" in the Federal Register, which stated that the final EIS was available for public inspection at a variety of federal offices. *Id.;* 45 Fed. Reg. 83,031 (1980); Del Norte App. 6.

According to Section 1506.10 of the CEQ regulations, thirty days must elapse between publication of the notice of availability of the final EIS and the Secretary's decision on the proposed designation. 40 C.F.R. § 1506.10. As January 16, 1981 approached, three lawsuits were filed, one by the Del Norte Plaintiffs, which sought to enjoin the Secretary from acting until January 21, 1981 at the earliest. By that date, of course, Secretary Andrus would have been replaced by James Watt, the first Secretary of the Interior for the Reagan Administration. In two of the cases, the District Courts granted temporary relief, restraining Secretary Andrus from acting on California's application. *County of Josephine* v. *Andrus,* No.

CV 81-34 (D. Ore. filed Jan. 15, 1981); *County of Del Norte* v. *Andrus,* No. C 80 3964 WAI (N.D. Cal. filed Jan. 16, 1981); ACWA App. H. On January 19, 1981, the last full day of the Carter Administration, the Court of Appeals vacated these orders, ruling that the District Courts lacked jurisdiction because final agency action had not yet occurred. *County of Josephine* v. *Andrus,* No. 81-3036, and *County of Del Norte* v. *Andrus,* No. 81-4030 (9th Cir. filed Jan. 19, 1981); ACWA App. I.

That same day, Secretary Andrus accepted California's application in part and designated 1,235 river miles as components of the National Wild and Scenic Rivers System.[3] *Del Norte,* 732 F.2d at 1465. In one of his last official acts, Secretary Andrus formally transmitted his decision to Governor Brown in a letter mailed on the morning of January 20, 1981. EDF App. B.

III.

THE LITIGATION

Shortly thereafter, Plaintiffs commenced the present litigation. They claimed that Secretary Andrus' designation of the five California rivers was invalid, because: (1) the Secretary acted prematurely under the CEQ regulations; (2) the Secretary's conclusion that California would be able permanently to administer the rivers was arbitrary and capricious; and (3) the final EIS was inadequate. Respondents were granted leave to intervene in the cases as defendants.

On February 9, 1983, the District Court granted Plaintiffs' motion for summary judgment and invalidated the Secretary's designation of the rivers. ACWA App. D. Defendants appealed this decision, and the Court of Appeals reversed. *County of Del Norte* v. *United States,* 732 F.2d 1462 (9th Cir. 1984).

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[3] Governor Brown had asked the Secretary to include a total of 4,006 river miles in the National System. EDF App. A.

First, the Court of Appeals held that there was no basis for the designation to be set aside under the CEQ regulations. *Id.* at 1464. Plaintiffs had urged that the filing of the final EIS with EPA on Friday, December 12, 1980 was premature, because HCRS did not complete its mailing to the public until Monday, December 15. Section 1506.9 of the CEQ regulations provides that filing may occur no earlier than the EIS is "transmitted to commenting agencies and made available to the public." 40 C.F.R. § 1506.9. In turn, Section 1506.10 states that EPA "shall publish a notice in the Federal Register each week of the environmental impact statements filed during the preceding week." *Id.* § 1506.10(a). Thus, Plaintiffs argued, the earliest date on which the final EIS could be filed with EPA was December 15 (*i.e.*, when distribution was completed), and the notice of availability could be published no earlier than the week of December 22, 1980. Section 1506.10 also provides that agency action based on the final EIS may not occur until at least thirty days after publication. *Id.* § 1506.10(b)(2). Under Plaintiffs' theory, therefore, the Secretary could not have acted until January 21, 1981. Accordingly, Secretary Andrus' designation of the rivers on January 19 was premature by two days.

The Court of Appeals acknowledged Plaintiffs' factual arguments, but concluded that the substantive requirements of the CEQ regulations had been fulfilled. According to the Court, the purpose of Sections 1506.9 and 1506.10

> "[i]s to ensure that all pertinent information is available on proposed action for a period of 30 days before final action is taken, and that interested parties have notice of that availability. This 30-day period is not for the purpose of additional public comment and review, *California* v. *Block*, 690 F.2d 753, 771 (9th Cir. 1982), but, in the words of one commentator, is 'to allow a sufficient review period for the final statement and comments and views of commenting agencies "to accompany the proposal through the existing agency review process."' 2 F. Grad, *Treatise on Environmental Law* § 9.02 at 9-113 (1980) (quoting 42 U.S.C. § 4332(2)(C)). The provision for publication the week following distribution and filing of the EIS is no more than a precautionary measure to ensure the desired result." *Del Norte*, 732 F.2d at 1466.

The Court observed that, by the time the notice of availability appeared in the Federal Register, copies of the final EIS had been distributed to the public and all commenting agencies as required by Section 1506.9. *Id.* at 1465. Indeed, Plaintiffs had *received* their copies by December 17, 1980, the date on which the notice appeared. *Id.* Moreover, the Secretary waited thirty-three days—three days longer than required by Section 1506.10—before taking action on the final EIS. *Id.*

Under these circumstances, the Court concluded, the alleged irregularities in the timing of the filing and publication of the final EIS fell within the scope of Section 1500.3 of the CEQ regulations, which declares "the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action." 40 C.F.R. § 1500.3. For executive action to be struck down under Section 1500.3, the Court held, the alleged violation of the regulations "must have borne some relationship to the decision making process itself." *Del Norte,* 732 F.2d at 1466. Here, the purported violation did not prevent the Secretary from fulfilling his duties under the regulations, for "when the Secretary designated the rivers on January 19, more than the required 30 days following publication had passed." *Id.* at 1465. Nor were Plaintiffs, or anyone else, harmed in any way. As the Court emphasized:

> "The irregularity in filing the notice before circulation . . . had no effect whatsoever on the plaintiffs' opportunity to review the EIS after publication of the notice; nor did it affect the opportunity of the interested agencies and members of the public to review the statement for 30 days following publication." *Id.*[4]

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[4] Throughout this litigation, Plaintiffs have argued that they were "injured" by the allegedly premature filing of the final EIS, because "[h]ad the Notice of Availability been published one week later, in accordance with law, Governor Brown's application would have been referred to Secretary Andrus' successor for action." ACWA Pet. 26. As the Court of Appeals aptly noted,

> "[i]t was, however, in large part the actions of these plaintiffs, in obtaining a temporary restraining order in November, 1980, that made the 'prematurity' significant. The order delayed approval of the EIS for seventeen days before the district court dissolved it for lack of jurisdiction." 732 F.2d at 1466.

Accordingly, because "[t]he integrity of the decision making process and the public's opportunity to comment in accordance with all legal requirements were not compromised in any way," the Court ruled that the District Court had no authority to set aside the Secretary's action. *Id.* at 1466-67.[5] The Court also referred to "the general rule that insubstantial errors in an administrative proceeding that prejudice no one do not require administrative decisions to be set aside." *Id.* at 1467 (citing, *inter alia, Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978)).

Second, the Court of Appeals held that Secretary Andrus did not act arbitrarily or capriciously. The District Court had ruled that, in deciding to include the rivers in the National System, the Secretary did not adequately consider "language from a California Superior Court opinion in a suit by many of these same plaintiffs to enjoin the California Governor from applying for federal designation of the rivers." *Id.* at 1467. In *County of Del Norte* v. *Brown,* No. 292019 (Cal. Super. Ct. Sacramento Co. filed Dec. 5, 1980), Judge Fred W. Marler, Jr. held that he had no power to order Governor Brown to withdraw his application to Secretary Andrus. ACWA App. P, at A-186-A-187. Judge Marler went on to state his opinion, however, that under the California Wild and Scenic Rivers Act as it existed in December 1980, the Governor had no authority

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[5] The Court acknowledged that when the final EIS was filed with EPA on Friday, December 12, 1980, a staff member of HCRS signed a declaration that incorrectly stated that distribution of the EIS had been completed. 732 F.2d at 1467; *see* Del Norte App. 4. In fact, complete distribution was not accomplished until Monday, December 15. 732 F.2d at 1465. Although "mindful and respectful of the district court's concern ... that the false statement itself was a blemish on the decision making process," the Court of Appeals held that the false affidavit was legally irrelevant, because it was not made in bad faith and had no effect on either the Plaintiffs or the Secretary's action. *Id.* at 1467. Indeed, the Court observed that "[o]n appeal, plaintiffs properly have refrained from arguing that the falsity of the declaration has any independent significance." *Id.*

to commit the State permanently to administer the rivers.[6] The Judge acknowledged that it was within the discretion of the Secretary of the Interior to determine whether California could "permanently administer" its rivers within the meaning of Section 2(a)(ii) of the National Wild and Scenic Rivers Act. *Id.* at A-188. He stated, however, that the Secretary—who was not a party to the lawsuit—should decide this question in light of the state court's interpretation of the California Act. *Id.*

In the present cases, the District Court held that this admonition had not been adequately drawn to Secretary Andrus' attention. ACWA App. D, at A-31; 732 F.2d at 1467. The Court of Appeals reversed. It concluded:

> "Full review of the record reveals . . . that the decision was both paraphrased in a memorandum to the Secretary and attached in full as an addendum to that memorandum. The Secretarial Issue Document noted the state court opinion, but concluded that sufficient other state law protections existed to satisfy the permanent administration requirement under the federal act. The record thus belies the contention that the state court opinion was not considered. In the absence of clear evidence to the contrary, courts presume that public officers properly discharge their duties, including reading memoranda addressed to them." *Id.* at 1468.

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[6] At the time Judge Marler issued his memorandum decision, the California Wild and Scenic Rivers Act required the Secretary of the California Resources Agency to "[p]repare a management plan to administer the rivers and their adjacent land areas" and to "[s]ubmit such management plan to the Legislature for its approval." Cal. Pub. Res. Code § 5093.58 (West Supp. 1982); ACWA App. M, at A-108. Judge Marler reasoned that, because the California Legislature had not yet approved a management plan for the rivers included in Governor Brown's application, the California Secretary for Resoruces could not "guarantee to 'permanently administer' the five rivers." ACWA App. P, at A-186. This issue is now moot, however, because the California Legislature amended the state Wild and Scenic Rivers Act in 1982 to eliminate the requirement that a management plan be submitted to and approved by the Legislature. Cal. Stats. 1982, ch. 1481, p.8004, § 10; ACWA App. M, at A-133.

Finally, the Court of Appeals held that there exist no triable issues of fact to support Plaintiffs' claim that the final EIS was inadequate. ACWA App. B. Accordingly, the Court reversed the judgment of the District Court and ordered the cases remanded for entry of judgment in favor of Defendants. 732 F.2d at 1468.

REASONS WHY THE WRITS SHOULD BE DENIED

The petitions for writs of certiorari are long on rhetoric,[7] but short on explanation why this Court should review the decision of the Court of Appeals. In fact, there is no reason for the Court to exercise its discretionary jurisdiction, for the Court of Appeals' decision involves nothing more than the application of well-settled principles of administrative law to a complex set of facts.

I.

THE COURT OF APPEALS' PROPER DEFERENCE TO THE CEQ'S INTERPRETATION OF ITS OWN REGULATIONS DOES NOT MERIT REVIEW BY THIS COURT.

The Court of Appeals held that the District Court erred in setting aside the Secretary's designation of the rivers as premature under the CEQ regulations, because the District Court's action was inconsistent with the Council's own admonition that "any trivial violation of these regulations not give rise to any independent cause of action." 40 C.F.R. § 1500.3, *discussed in Del Norte,* 732 F.2d at 1466. This decision involves no issue of statutory interpretation. Rather, the Court simply applied the CEQ's interpretation of its own regulations to the procedures followed by HCRS and EPA in filing and publishing the final EIS.

As the Court of Appeals observed, the purpose of the "trivial violation" rule was to make clear the Council's intention that " 'trivial departures from the requirements established by the Council's regulations' " not "result in judicial invalidation

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[7] *See, e.g.,* Del Norte Pet. 23: "This case presents a serious attack on our system of government."

of agency actions." 732 F.2d at 1466 (quoting National Environmental Policy Act—Regulations: Comments and the Council's Response, 43 Fed. Reg. 55,981 (1978)). The Court concluded that this admonition must mean that "[a]ny violation which in the end requires the agency action to be set aside must have borne some relationship to the decision making process." *Id.* Because all of the substantive requirements of the regulations had been fulfilled—the EIS had been distributed to the public and all commenting agencies by the time the notice of availability appeared in the Federal Register, and the Secretary waited more than thirty days before acting on the final EIS—the Court of Appeals held that the "irregularities" in the filing and distribution of the EIS were "trivial" and therefore nonactionable under Section 1500.3. *Id.*

Thus, as required by *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979), and other cases,[8] the Court of Appeals properly deferred to the CEQ's interpretation of its own regulations. Indeed, the Court had before it declarations from the Director of the Office of Federal Activities of EPA and the Chairman of the CEQ under the Carter Administration and an affidavit from the General Counsel of the CEQ under the Reagan Administration, which stated that the procedure followed by HCRS and EPA in these cases was a well-established administrative practice and fully satisfied the public review and comment requirements of Sections 1506.9 and 1506.10. EDF App. C-E.

The Court of Appeals' decision involves nothing more significant than judicial deference to the CEQ's interpretation of its own regulations. This deference accords with the decisions of this Court and other federal courts cited above. Accordingly, there are no "special or important reasons" for this Court to review the Court of Appeals' decision.

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[8] *See, e.g., Sierra Club* v. *Sigler*, 695 F.2d 957, 972 (5th Cir. 1983) (CEQ's interpretation of its own regulations "are binding on this court and agencies preparing EIS's"); *Pacific Coast Medical Enterprises* v. *Harris*, 633 F.2d 123, 131 (9th Cir. 1980) (agency's construction of one of its own regulations must "be affirmed if it is not clearly erroneous or inconsistent with the regulation").

II.

THE COURT OF APPEALS CORRECTLY APPLIED THE DECISIONS OF THIS COURT IN CONCLUDING THAT THE SECRETARY DID NOT ACT ARBITRARILY OR CAPRICIOUSLY.

The Court of Appeals' conclusion that Secretary Andrus did not act arbitrarily or capriciously similarly does not warrant review by this Court. Plaintiffs alleged, and the District Court held, that dictum in a California Superior Court opinion—that California would not be able permanently to administer the rivers—was not adequately drawn to the Secretary's attention. *See* pp. 9-10, *supra*. As the Court of Appeals pointed out, "[f]ull review of the record reveals, however, that the decision was both paraphrased in a memorandum to the Secretary and attached in full as an addendum to that memorandum." *Del Norte,* 732 F.2d at 1468. The Court concluded that "[t]he record thus belies the contention that the state court opinion was not considered." *Id.*

There is no reason for this Court to grant certiorari simply to review this decision. The Court of Appeals correctly found that, before making his designation decision, the Secretary considered the state court's admonition that California would not be able permanently to administer the rivers until the Legislature had approved a management plan for them. As the Court noted, not only was the state court's opinion paraphrased in the Secretarial Issue Document ("SID"), but the entire text of the opinion was attached as an addendum to the SID. *Id.* at 1468; *see* Del Norte App. 1, at A-7. Indeed, in his letter to Governor Brown, Secretary Andrus made clear his understanding that the California Legislature had not yet approved a river management plan. The Secretary stated that "California has fulfilled the requirements of Section 2(a)(ii) of the Act by designating the rivers under the California Wild and Scenic Rivers Act and by adopting a program of action which is adequately protecting the river environments from adverse state and local actions." EDF App. B. He encouraged the Governor, however, "in completing formal management plans for the rivers and in having them adopted by the State Legislature. These would serve to focus attention on the state's protective

program and would provide additional details of land use regulation and resource administration." *Id.*

Thus, the administrative record abundantly supports the Court of Appeals' conclusion that the Secretary considered the state court's interpretation of Section 2(a)(ii) of the National Rivers Act. The Court of Appeals applied the correct legal standard to its review of the record.[9] Accordingly, there is no reason for this Court to review the Court of Appeals' review of the administrative record.

III.

THERE IS NO REASON FOR THIS COURT TO REVIEW THE SECRETARY'S DISCRETIONARY DECISION TO DESIGNATE THE RIVERS.

Plaintiffs also claim that the Secretary's inclusion of the rivers in the National System was an abuse of his discretion, because the California Legislature had not yet approved a management plan for the rivers. According to Plaintiffs, this fact is of twofold significance. First, Plaintiffs argue that until the Legislature approves a management plan, the rivers are not "designated" wild and scenic under California law as required by Section 2(a)(ii) of the National Rivers Act. ACWA Pet. 14-16; Del Norte Pet. 11-13; *see* p. 3, *supra*. Second, Plaintiffs urge that in the absence of a management plan the Secretary was required to find that California would not be able permanently to administer the rivers. ACWA Pet. 13-15; Del Norte Pet. 16-18. Plaintiffs raised this claim only on petition for rehearing (*see* ACWA App. C., at A-14-A-19), which the Court of Appeals denied. ACWA App. B.

Contrary to Plaintiffs' assertions, the National Wild and Scenic Rivers Act contains no requirement that the state legislature approve a management plan for the rivers, and the

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[9] *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971) ("court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgement"); *cf. Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 103 S. Ct. 2856, 2867 (1983) ("agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem").

California Wild and Scenic Rivers Act makes no mention of "permanent administration."[10] As the language of Section 2(a)(ii) of the National Act makes clear, the sole purpose of the permanent administration requirement is to ensure that the State will be able permanently to administer the rivers "without expense to the United States other than for administration and management of federally owned lands." 16 U.S.C. § 1273(a)(ii). The permanent administration element of the federal statute thus has nothing to do with the management plan requirement of the California statute.

With this understanding of the two Acts in mind, it is clear that Plaintiffs' claim does not merit review by this Court. First, the issue raised by Plaintiffs is relevant only to the facts of these cases. Plaintiffs have not identified any other state that requires its legislature to approve a management plan for rivers it has designated as wild and scenic; nor are we aware of any such state. Moreover, management plans are no longer necessary even in California, for in 1982 the State Legislature amended the California Wild and Scenic Rivers Act to eliminate that requirement. Cal. Stats. 1982, ch. 1481, p.8004, § 10; ACWA App. M, at A-133. Thus, there is no reason to believe that the issue whether the Secretary may include rivers in the National Rivers System for which the state legislature had not yet approved a management plan will arise in any future case.

Second, there is no conflict between Secretary Andrus' designation of the rivers and California law. Plaintiffs urge that the rivers had not been "designated" by the California Legislature as required by Section 2(a)(ii) of the National Act, because the Legislature had not yet approved a management plan. This argument is contrary to the language of the

[10] The ACWA Plaintiffs' statement that the California Legislature "required that, before he could 'permanently administer' the system," the California Secretary for Resources must prepare a management plan for the rivers and submit the plan to the Legislature (ACWA Pet. 17) is a misleading mischaracterization of the California Act. The statute quoted by Plaintiffs, Cal. Pub. Res. Code § 5093.58 (West Supp. 1982), which has now been repealed, did not use the term "permanent administration." *See* ACWA App. L, at A-108. Rather, the permanent administration requirement is solely a matter of federal law, designed to ensure that when the Secretary of the Interior accepts state-designated rivers into the National Rivers System, the United States will not bear any of the cost of their administration. 16 U.S.C. § 1273(a)(ii).

California Wild and Scenic Rivers Act. Section 5093.54 of the Act, which was enacted in 1972, declares that "[t]he following rivers are *designated* as components of the system" and then names the Klamath, Trinity, Smith, Eel, and American Rivers. ACWA App. L, at A-105-A-107 (emphasis added). Thus, the rivers clearly had been "designated as wild, scenic or recreational rivers by or pursuant to an act of the Legislature" as required by Section 2(a)(ii) of the National Act. 16 U.S.C. § 1273(a)(ii).[11]

Plaintiffs also argue that the Secretary had no authority to include the rivers in the National System, because without a management plan approved by the California Legislature the State would not be able permanently to administer the rivers. This argument misapprehends the purpose of the "permanent administration" requirement. Section 2(a)(ii) directs the Secretary to determine that the State can permanently administer the rivers as wild, scenic, or recreational *without expense to the United States*. As the statutory language makes clear, Congress sought to ensure that the State, not the United States, would pay the costs of administering the rivers as components of the state and national rivers systems. The statute reveals no congressional interest, however, in determining *how* the State would go about this task—for example, whether the State would administer the rivers through its Resources Agency or pursuant to a management plan approved by the State Legislature. Thus, the failure of the Legislature to approve a

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[11] Plaintiffs contend that Section 5093.54 does not "designate" the Eel River, because it provides that "after an initial period of 12 years following the effective date of this chapter, the Department of Water Resources shall report to the Legislature as to the need for water supply and flood control projects on the Eel River and its tributaries, and the Legislature shall hold public hearings to determine whether legislation should be enacted *to delete* any segment of the river from the system." Cal. Pub. Res. Code § 5093.54(d) (emphasis added); ACWA App. L, at A-106-A-107; *see* ACWA Pet. 14-16. This argument is contradicted by the terms of the statute, which "designates" the Eel and its tributaries as components of the state system, while simply committing the Legislature in 1984 to review this designation and to determine whether "to delete all or any segment of the river from the system." Indeed, the opinion of the California Superior Court on which Plaintiffs rely so heavily in support of their argument about permanent administration, *County of Del Norte* v. *Brown*, No. 272019 (Cal. Super. Ct. Sacramento Co. filed Dec. 5, 1980), confirms that "[t]he Eel River is currently designated as a component of the California System." ACWA App. P., at A-187.

management plan was irrelevant to the Secretary's decision whether California could permanently administer the rivers without expense to the United States. Conversely, the Secretary's inclusion of the rivers in the National System in no way altered the duty of the California Secretary for Resources to submit a management plan to the Legislature (a duty which no longer exists).

Third, Secretary Andrus' decision that, even without a formal management plan, California would be able permanently to administer the rivers was a policy determination within the Secretary's broad discretionary authority. Last Term, this Court confirmed the long-established principle that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," particularly where the action taken by the department "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute." *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2782, 2783 (1984). The administrative record in these cases makes clear that Secretary Andrus carefully considered whether the absence of a management plan would disable the State from permanently administering the rivers without expense to the United States. The Secretary reviewed the laws of California and the State's eight-year experience in managing the rivers and concluded that "California has fulfilled the requirements of Section 2(a)(ii) of the [National] Act by designating the rivers under the California Wild and Scenic Rivers Act and by adopting a program of action which is adequately protecting the river environments from adverse State and local actions." EDF App. B.[12] Inasmuch as the Court of Appeals properly deferred to the

[12] The Secretarial Issue Document further explicates the Department's consideration of this question:

> "The California Wild and Scenic Rivers Act requires that the Resources Agency develop management plans for the rivers and submit them to the State legislature for approval. No river has an approved management plan to date, and this has raised serious questions (a major point in lawsuits against the Federal and State governments) as to whether there is assurance that the rivers will be "permanently administered" by the State. Nevertheless, the State has asserted that considerable protection is afforded these rivers where they flow across State and private lands. After review of applicable California legal authorities and existing management practices, a finding has been made that the State has

Secretary's discretionary determination that California could permanently administer the rivers, there is no reason for this Court to review the decision upholding the Secretary's action.[13]

IV.

THIS COURT SHOULD NOT REVIEW THE COURT OF APPEALS' DECISION THAT NO TRIABLE ISSUES OF FACT EXIST TO SUPPORT PLAINTIFFS' CLAIM THAT THE FINAL EIS WAS INADEQUATE.

Plaintiffs' last request is for this Court to review the Court of Appeals' determination that there exist no triable issues of fact to support Plaintiffs' claim that the final EIS was inadequate. This claim involves no issue significant to the administration of NEPA generally. *Cf. Andrus* v. *Sierra Club,* 442 U.S. 347 (1979) (whether federal agencies are required to prepare EIS's to accompany appropriation requests); *Kleppe* v. *Sierra Club,* 427 U.S. 390 (1976) (whether approval of numerous individual coal development projects in Northern Great Plains area required preparation of an EIS for entire region). Rather, the sole question presented is whether the Court of Appeals erred in reviewing the administrative record,

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(Footnote continued from previous page)

provided the required commitment to permanently administer the rivers, has demonstrated a present ability to accomplish this end through an existing administrative framework, and has the necessary legal authority to achieve such protection." United States Department of the Interior, Secretarial Issue Document, California Rivers Application, Jan. 16, 1981; Del Norte App. 1, at A-11-A-12.

[13] Plaintiffs also raise for the first time a claim that the Secretary's designation of the rivers violates the Tenth Amendment. ACWA Pet. 18-21; Del Norte Pet. 15-16. Plaintiffs did not allege this claim in their complaints, nor did they argue the claim before either the District Court or the Court of Appeals. Under these circumstances, they may not present their contentions to this Court. *FTC* v. *Grolier, Inc.,* 462 U.S. 19, 103 S. Ct. 2209, 2212 n.6 (1983); *Rogers* v. *Lodge,* 458 U.S. 613, 628 n.10 (1982); *United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977).

together with the final EIS, and concluding that the EIS was not inadequate.[14] This Court should not expend its limited time adjudicating the adequacy of a single EIS for a specific project that is of no possible relevance to any other federal action.

CONCLUSION

For the reasons set forth above, the petitions for writs of certiorari should be denied.

DATED: December 4, 1984.

Respectfully submitted,

THOMAS J. GRAFF
ENVIRONMENTAL DEFENSE FUND
2606 Dwight Way
Berkeley, California 94704
Telephone: 415/548-8906

Of Counsel

BRIAN E. GRAY*
HOWARD, RICE, NEMEROVSKI,
CANADY, ROBERTSON & FALK
A Professional Corporation
Three Embarcadero Center,
7th Floor
San Francisco, California 94111
Telephone: 415/434-1600
Attorneys for Respondents

**Counsel of Record*

[14] The Court of Appeals' task was extremely limited. In reviewing the adequacy of an EIS, " '[t]he only role for a court is to insure that the agency has taken a "hard look" at the environmental consequences.' " *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 228 (1980) (per curiam) (quoting *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976)). The courts commonly resolve this question by summary adjudication based on a review of the administrative record. *See, e.g., Strycker's Bay, supra; Conservation Law Foundation of New England, Inc.* v. *GSA*, 707 F.2d 626 (1st Cir. 1983); *Sierra Club* v. *Sigler*, 695 F.2d 957 (5th Cir. 1983); *Izaak Walton League of America* v. *Marsh*, 655 F.2d 346 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Coalition For Canyon Preservation* v. *Bowers*, 632 F.2d 774 (9th Cir. 1980).

APPENDIX

Page

A. Application from Governor Brown to Secretary Andrus pursuant to 16 U.S.C. § 1273(a)(ii) (7-18-80) C.R. 44 ..... A-1

B. Designation of rivers reported in letter from Secretary Andrus to Governor Brown (1-19-81) C.R. 44 A-4

C. Declaration of William Hedeman (6-4-84) C.R. 16A & 49 ..... A-6

D. Declaration of Gus Speth, filed in *County of Del Norte* v. *Andrus*, No. C 80 3964 WAI (N.D. Cal. 1981) (1-15-81) A-10

E. Declaration of Nancy Nord (6-28-82) C.R. 79 .....A-13

APPENDIX A

State of California
GOVERNOR'S OFFICE
SACRAMENTO 95814

EDMUND G. BROWN JR. 916/445-2843

July 18, 1980

The Honorable Cecil D. Andrus
Secretary of the Interior
Interior Building, Room 6151
Washington, D.C. 20240

Dear Secretary Andrus:

Some of the nation's most striking rivers still flow freely through the rugged mountains of Northern California to the sea. These productive rivers and their watersheds are the base of Northern California's economy. They are a stirring symbol of the force and beauty of the natural world as well.

The Legislature of the State of California has designated certain rivers as components of the California Wild and Scenic Rivers System (Public Resources Code Sections 5093.50-5093.64). I also believe that these designated rivers should remain undeveloped; therefore, in accordance with Section 2(a)(ii) of the Wild and Scenic Rivers Act, Public Law 90-542 (16 U.S.C., 1271 et seq.), I do hereby request on behalf of the State of California that the following rivers be designated National Wild and Scenic Rivers:

(a) *Klamath River.* The main stem from 100 yards below Iron Gate Dam to the Pacific Ocean; the Scott River from the mouth of Shackleford Creek west of Fort Jones to the river mouth near Hamburg; the Salmon River from Cecilville Bridge to the river mouth near Somesbar; the North Fork of the Salmon River from the intersection of the river with the south boundary of the Marble Mountain Wilderness Area to the river mouth; Wooley Creek, from

the western boundary of the Marble Mountain Wilderness Area to its confluence with the Salmon River.

(b) *Trinity River.* The main stem from 100 yards below Louiston Dam to the river mouth at Weitchpac; the North Fork of the Trinity from the intersection of the river with the southern boundary of the Salmon-Trinity Primitive Area downstream to the river mouth at Helena; New River from the intersection of the river with the Southern Boundary of the Salmon Trinity Primitive Area downstream to the river mouth near Burnt Ranch; South Fork of the Trinity from the junction of the river with State Highway 36 to the river mouth near Salver.

(c) *Smith River.* All its tributaries from the Oregon-California state boundary to the Pacific Ocean.

(d) *Eel River.* The main stem from 100 yards below Van Arsdale Dam to the Pacific Ocean; the South Fork of the Eel from the mouth of Section Four Creek near Branscomb to the river mouth below Weott; Middle Fork of the Eel from the intersection of the river with the southern boundary of the Middle Eel-Yolla Bolly Wilderness Area to the river mouth at Dos Rios; North Fork of the Eel from the Old Gilman Ranch downstream to the river mouth near Ramsey; Van Duzen River from Dinsmores Bridge downstream to the river mouth near Fortuna.

(e) *American River.* The Lower American from Nimbus Dam to its junction with the Sacramento River.

These rivers will be administered permanently as wild, scenic, or recreational rivers by the Resources Agency, or one of its constituent departments, without expense to the United States other than for the administration and management of federally-owned lands. A partial list of the State's Statutory authority for permanently administering the rivers is attached as Appendix A.

We believe that each of these rivers meets the criteria established in federal statute for inclusion in the National Wild and Scenic Rivers System.

Therefore, I respectfully request that you consider and approve California's application to include the named rivers into the National System.

Sincerely,

EDMUND G. BROWN JR.
Governor

APPENDIX B

EXHIBIT "47"

United States Department of the Interior

Office of the Secretary
Washington, D.C. 20240

January 19, 1981

Honorable Edmund G. Brown, Jr.
Governor of California
Sacramento, California

Dear Jerry:

I am pleased to advise you that favorable action has been taken on your request that five California rivers be designated as components of the National Wild and Scenic Rivers System as provided for in Section 2(a)(ii) of the Wild and Scenic Rivers Act, P. L. 90-542, as amended. The specific segments designated are identified in the enclosed Notice. Although we were not able to designate all 4,000+ miles included in your application, we believe the approximately 1,235 miles designated go a long way toward protecting the essential values of the rivers from adverse Federal actions. I note with pleasure that California now has passed my State of Idaho in numbers and miles of rivers in the National Wild and Scenic Rivers System and in this regard is second in the Nation only to the State of Alaska. This is the most significant use of Section 2(a)(ii) of the Federal Wild and Scenic Rivers Act since its passage in 1968 and serves to demonstrate that protection of natural resource values of the Nation's rivers does indeed involve a Federal/State partnership.

California has fulfilled the requirements of Section 2(a)(ii) of the Act by designating the rivers under the California Wild and Scenic Rivers Act and by adopting a program of action which is adequately protecting the river environments from adverse State and local actions. We encourage you in completing formal management plans for the rivers and in having them adopted by the State legislature. These would

serve to focus attention on the State's protective program and would provide additional details of land use regulation and resource administration.

With regard to the smaller tributaries of the Smith River which were not deemed eligible for the National System, but which California chose to put into its State system, we recognize that the high water quality of those tributaries is essential to maintaining the outstandingly remarkable anadromous fishery resource of the river system. We expect that the State and the U.S. Forest Service will take all necessary steps to sustain and possibly improve their present quality.

Finally, I want to compliment all the personnel in your resources agency who have worked so diligently to make these designations possible. They have worked with the spirit and determination that only true dedication to a cause can elicit. You have every right to be proud of them.

Sincerely,

CECIL D. ANDRUS

Enclosure

cc:
Secy's Files
Secy's RF (2)
AS/FW; LW
Ron Way (FW)
Solicitor
OPA
CL
HCRS
John Haubert (HCRS)

JHaubert:lrp:1/19/81:HCRS:x-4793

APPENDIX C

ORIGINAL
FILED
JUNE 4-1981
WILLIAM L.
WHITTAKER
CLERK U.S.
DISTRICT COURT
NORTHERN
DISTRICT
OF CALIFORNIA

CAROL E. DINKINS
Assistant Attorney General
(202) 633-2701
ANTHONY C. LIOTTA
Deputy Assistant Attorney General
(202) 633-2718
JACQUES B. GELIN (202) 633-2762
WILLIAM M. COHEN (202) 633-2704
JANICE SIEGEL (202) 633-4046
ATTORNEYS, DEPARTMENT OF JUSTICE
Land and Natural Resources Division
Washington, D.C. 20530

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ASSOCIATION OF CALIFORNIA WATER AGENCIES, *et al.*, *Plaintiffs* v. THE UNITED STATES OF AMERICA, *et al.*, *Defendants*	**Civil Action No. C-81-1457-WAI DECLARATION OF WILLIAM HEDEMAN**

I, William Hedeman, do hereby declare and testify:

(1) I am the Director of the United States Environmental Protection Agency's (EPA) Office of Federal Activities. I have served in this capacity since January, 1979.

(2) The Office of Federal Activities is responsible for receiving all environmental impact statements (EISs) filed with EPA pursuant to 40 C.F.R. § 1506.9 and filing Notices of Availability of such EISs pursuant to 40 C.F.R. § 1506.10(a).

(3) Pursuant to 40 C.F.R. § 1506.10(a), the Office of Federal Activities has established an administrative practice which applies when the filing agency cannot meet the normal deadlines EPA has set for its own internal management needs. Our normal practice is that an EIS be filed and distributed on the last day of the work week before the work week in which the Notice of Availability is published in the *Federal Register*. When the filing agency cannot follow our normal practice we allow for the publication of a *Federal Register* Notice of Availability of an EIS during the same week copies of that EIS are distributed to the public and delivered in printed form to EPA. This practice will be followed only if a working copy of the EIS is made available to EPA by the last day of the prior work week, and if copies are distributed to the public and a printed copy is delivered to EPA by the time the Notice of Availability is published in the *Federal Register*. A working copy is required so that EPA will have the information necessary to develop an Agency abstract of the EIS. This abstract is used for purposes of publishing the *Federal Register* Notice. When these conditions are satisfied, EPA treats the EIS as having been filed in accordance with 40 C.F.R. 1506.9 on the date the working copy was delivered to EPA.

(4) This practice has been established to provide administrative flexibility in the implementation of the requirements of section 1506.10(a) while satisfying the intent of section 1506.9 that the EIS be available for review at the time the Notice of Availability is published in the *Federal Register*.

(5) This adminsitrative practice has been followed in the following instances:

Agency	EIS Status	Project	Date Arrangement Made with EPA
Corps of Engineers	Final	Permit-Prudhoe Bay-Water Flood Project, Alaska	10/9/80
Nuclear Regulatory Commission (NRC)	Final	Primary Cooling System-Chemical Decontamination at Dresden Nuclear Power Station, Unit #1	10/20/80
Air Force	Draft	Consolidated Space Operation Center	10/24/80
EPA	Final	201 Project for Santa Fe, New Mexico	10/24/80
Bureau of Land Management	Draft	E.P.S.I. Coal-Slurry Pipeline Project	10/29/80
NRC	Draft Supplement	Virgil C. Summer, Unit #1 Fairfield County, South Carolina	11/6/80
Office of Surface Mining (OSM)	Final	Alton Mine, Utah, Section 522 Determination	11/12/80
Fish and Wildlife Service	Final	Trinity River Project	11/25/80
HCRS	Final	Pinelands Reserve, New Jersey	12/3/80
Federal Energy Regulatory Commission (FERC)	Draft Supplement	Small Power Production and Co-Generation Facilities	12/4/80
HCRS	Final	California Wild and Scenic Rivers Proposal	12/10/80

Agency	EIS Status	Project	Date Arrangement Made with EPA
OSM	Final	Rojo-Caballos Mine Reclamation Plan	1/27/81
FERC	Final	Sulton River Project	2/27/81
National Oceanic and Atmospheric Administration	Draft	Deep Sea Bed Mining Program	3/12/81
FERC	Final	Small Power Production and Co-Generation Facilities	2/17/81 (approximate)

This list may not cover all instances for which this practice has been followed.

(6) Working copies of the FEIS entitled *Proposed Designation of Five California Rivers in the National Wild and Scenic Rivers System* were provided to EPA on Friday, December 12, 1980. Printed copies were delivered to EPA by Wednesday, December 17, 1980.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed at Washington, D.C. on June 3, 1981.

WILLIAM HEDEMAN

APPENDIX D

G. WILLIAM HUNTER
United States Attorney

CHARLES M. O'CONNOR
Assistant United States Attorney
P.O. Box 36055
450 Golden Gate Avenue
San Francisco, California 94102
Telephone: (415) 556-2245
Attorneys for Defendants

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF DEL NORTE, *et al.*, *Plaintiffs* vs. CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, *et al.*, *Defendants* STATE OF CALIFORNIA, *Intervenor*	**CIVIL No. C-80-3964 W.A.I. DECLARATION OF GUS SPETH**

GUS SPETH declares as follows:

(1) I am Chairman of the President's Council on Environmental Quality (CEQ). The Council is comprised of three members, including myself. As Chairman, I am principally responsible for administering the activities of the Council and staff. I have served in this capacity since July 1, 1979. Between March, 1977 and July 1, 1979, I served as a member of the Council.

(2) The CEQ was created by Title II of the National Environmental Policy Act of 1969 (NEPA). Under NEPA, the Council is located in the Executive Office of the President and is charged with overseeing the efforts of federal agencies to comply with the requirements of this law.

(3) On May 24, 1977, President Carter issued Executive Order 11911, which directed the Council to issue regulations implementing the procedural provisions of NEPA. The Executive Order directed that the NEPA regulations be designed to make the environmental impact statement (EIS) process more useful to decisionmakers and the public, and to reduce paper work and the accumulation of extraneous background data in order to focus on real environmental issues and alternatives. The Council's NEPA regulations were published in the *Federal Register* on November 29, 1978 (43 Fed. Reg. 55798-56007) and became effective eight months later on July 30, 1979. Shortly before the effective date of the NEPA regulations, the Supreme Court relied on the regulations in interpreting NEPA, saying "CEQ's interpretation of NEPA is entitled to substantial deference" and describing the preparatoin of the NEPA regulations as a "detailed and comprehensive process ordered by the President of transforming advisory guidelines into mandatory regulations applicable to all federal agencies." *Andrus* v. *Sierra Club,* 442 U.S. 347 (1979).

(4) The purpose of 40 C.F.R. § 1506.9, taken in conjunction with § 1506.10(b)(2), is to ensure that agencies and the public actually have 30 days for reviewing final EIS's, measured from the time the Environmental Protection Agency (EPA) publishes an EIS notice in the *Federal Register.* No longer period for public review is intended, except as specifically authorized by 40 C.F.R. § 1506.10(d).

(5) The purpose of 40 C.F.R. §§ 1506.9 and 1506.10(b)(2) would be satisfied if a final EIS is available

for public review for 30 days following publication of a *Federal Register* EIS notice.

(6) The first sentence in § 1506.10(a) is intended to facilitate the administrative convenience of EPA and provide EPA with adequate time to carry out its responsibilities for publishing a *Federal Register* notice of the filing of an EIS. The phrase "preceding week" used in the first sentence of 1506.10(a) is not intended to prevent EPA from publishing a notice in the *Federal Register* for an EIS filed with EPA during the same week the notice appears in the *Federal Register*. The phrase "preceding week" used in the first sentence of 1506.10(a) is not intended to enlarge the period of time provided under 1506.10(b)(2) for public and agency review of final EIS's.

(7) For these reasons, if the public and the agencies have actually been provided with thirty days to review and comment on the final EIS as required by § 1506.10(b)(2), failure to make complete delivery of the final EIS to the agencies and the public during the period preceding publication of the *Federal Register* notice is not a violation of the public review and comment requirements in the NEPA regulations and is, at most, a "trivial violation" of the second sentence in § 1506.9 within the meaning of 40 C.F.R. 1500.3.

Executed this 13 day of January, 1981, in Washington, D.C. I declare under penalty of perjury that the foregoing is true and correct.

GUS SPETH

APPENDIX G

G. WILLIAM HUNTER
United States Attorney
CHARLES M. O'CONNOR
Assistant United States Attorney
P.O. Box 36055
450 Golden Gate Avenue
San Francisco, California 94102
Telephone: (415) 556-2245
Attorneys for Defendants

**IN THE
UNITED STATES DISTRICT
COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA**

COUNTY OF DEL NORTE, *et al.*, *Plaintiffs* vs. THE UNITED STATES OF AMERICA, *et al.*, *Defendants* STATE OF CALIFORNIA *Intervenor*	**CIVIL No. C-81-0567-W.A.I.**
And ASSOCIATION OF CALIFORNIA WATER AGENCIES, *et al.*, *Plaintiffs* vs. THE UNITED STATES OF AMERICA, *et al.*, *Defendants* STATE OF CALIFORNIA, *Intervenor*	**CIVIL No. C-81-1457-W.A.I.**

DECLARATION OF NANCY NORD

NANCY NORD declares as follows:

(1) I am General Counsel of the President's Council on Environmental Quality (CEQ) and have served in this capacity since May 18, 1981. I am familiar with the regulations at 40 C.F.R. 1500 *et seq.* promulgated by CEQ on November 29, 1978.

(2) The purpose of 40 C.F.R. § 1506.9, taken in conjunction with § 1506.10(b)(2), is to ensure that agencies and the public actually have 30 days for reviewing final environmental impact statements (EIS's), measured from the time the Environmental Protection Agency (EPA) publishes an EIS notice in the *Federal Register*.

(3) The purpose of 40 C.F.R. §§ 1506.9 and 1506.10(b)(2) would be satisfied if a final EIS is available for public review for 30 days following publication of a *Federal Register* EIS notice.

(4) The first sentence in § 1506.10(a) is to provide EPA with adequate time to carry out its responsibillites for publishing a *Federal Register* notice of the filing of an EIS. The phrase "preceding week" used in the first sentence of 1506.10(a) is not intended to prevent EPA from publishing a notice in the *Federal Register* for an EIS filed with EPA during the same week the notice appears in the *Federal Register*. The phrase "preceding week" used in the first sentence of 1506.10(a) is not intended to enlarge the period of time provided under 1506.10(b)(2) for public and agency review of final EIS's.

(5) The purpose of the public review and comment requirements have been met if the public and the agencies have been provided with 30 days to review and comment on the final EIS. Failure to make complete delivery of the final EIS to the agencies and the public as set out in 40 C.F.R. 1506.9 if such failure does not result in the public and the agencies having less than 30 days to review and comment on the Final EIS is merely a "trivial violation" of § 1506.9 and is within the meaning of 40 C.F.R. 1500.3.

Executed this 23 day of June, 1982, in Washington, D.C. I declare under penalty of perjury that the foregoing is true and correct.

NANCY NORD

District of Columbia):
Subscribed and sworn to before me this 23rd day of June 1982